SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 239

VINCENT COLLETTI and SMILE GUAJARDO,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition For Writ of Certiorari To The Appellate Court of Illinois, Second District)

BRIEF AND ARGUMENT FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Appellate Court of Illinois, Second District, is reported in 101 Ill. App. 2d 51, 242 N.E.2d 63, and is accurately reproduced in Appendix A to the Petition.

JURISDICTIONAL STATEMENT

The jurisdictional requisites are adequately set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

The Statutory Provisions are set out in the Petition.

QUESTIONS PRESENTED

1. Whether the State is obliged to transcribe the testimony of all witnesses appearing before a Grand Jury?

2. Whether petitioner Colletti was prejudiced by admission into evidence of an exculpatory, self-serving post-arrest statement made by petitioner Guajardo which did not refer in any way to Colletti?

STATEMENT OF THE CASE

Petitioners' statement of the case is adequate for purposes of framing the issues.

REASONS FOR DENYING THE WRIT

I.

THE STATE'S INABILITY TO PRODUCE NON-EXISTENT EVIDENCE DID NOT PREJUDICE PETITIONERS.

Petitioners concede that no state or federal rule of procedure requires the transcription of testimony given before a Grand Jury. Certainly no such rule exists in Illinois. *People* v. *Aughenbough,* 36 Ill. 2d 320, 233 N.E. 2d 117. Petitioners argue, however, that due to certain "bizarre circumstances" failure to record grand jury testimony of the instant burglary victim amounted to "suppression of evidence possibly favorable to petitioners" (Br. p. 6) in violation of *Brady* v. *Maryland,* 373 U.S. 83, and *Giles* v. *Maryland,* 386 U.S. 66.

The first so-called "bizarre" circumstances relied on by petitioners is that the victim, Mrs. Birdsong, testified that in addition to the currency taken from her kitchen table, a ring and transistor radio were missing from her home and yet neither item was found on the person of either petitioner (Br. p. 8). Therefore, argue petitioners, what Mrs. Birdsong told the Grand Jury about her ring and radio was critical information withheld from them by the failure to record her testimony. Far from being vital, this information was completely irrelevant to the issue of the petitioner's guilt or innocence. Due to quick police work, petitioner Guajardo was apprehended right in Mrs. Birdsong's living room. Colletti attempted a hasty retreat via the back door but was apprehended in

the yard with Mrs. Birdsong's money in his sweater pocked.* To argue that the absence of ring or radio in the possession of either petitioner suggests their innocence is to ignore the simple fact that the petitioners were caught "red-handed".

Furthermore, the absence of the ring and radio was not noted or reported until sixteen days after the robbery. In the interim, Mrs. Birdsong moved to different quarters. Therefore, the missing items could have been taken at any time before, during, or after the robbery. On cross-examination, Mrs. Birdsong conceded that the radio and ring could have been taken on a date other than the robbery. (R. 141-146)

Left in this wholly non-probative posture, the ring and radio don't appear as a "bizarre circumstance" after all.

Another "bizarre" circumstance pointed out by petitioners is the fact that no "pair of sunglasses (was) found in the living room or outside, even though a thorough search was *made*" (Br. p. 8). Mrs. Birdsong had testified at trial that one of the home-invaders was wearing a pair of sunglasses. Here petitioners simply misstate the record. No search of the outside was made (R. 197, 352); and, of course, none was necessary since they were caught in the act.

Petitioners attach significance to the fact that Mrs. Birdsong testified one of the robbers was taller than the other, while petitioners are "the same height" (Br.

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*Colletti argues that his possession of the bills and coins found in his pocket was consistent with his employment as a catering truck operator (Br. p. 8), hardly convincing in light of the absence of any such truck in the area (R. 233-39).

p. 8). This assertion also does not accurately reflect the record. The police chief testified that his records showed Colletti two inches taller than Guajardo, but that the men appear to be "about" the same height. (R. 239). Mrs. Birdsong testified that when she saw petitioners in her driveway after their arrest, one appeared to be taller than the other (R. 90-101). Thus, even if petitioners are the same height, a fact not necessarily established in the record, the most that can be said is that they didn't look that way to Mrs. Birdsong.

Petitioners' arguments regarding the victim's testimony about irrelevant matters do not support their claim that the prosecution deliberately suppressed evidence favorable to them. The mere failure to transcribe Grand Jury testimony can hardly constitute a suppression of evidence, especially when, as petitioners believe, this is done as a general practice and not selectively. The theory advanced by petitioners' exceeds the scope of the case at hand and would in essence require the police and prosecutors to take written statements from each and every prospective witness. Due Process does not dictate the mandatory imposition of such a clerical responsibility.

Respondent further contends that petitioners' almost random insertion of cases such as *Giles* v. *Maryland, supra,* and *Brady* v. *Maryland, supra,* are little more than undisguised attempts to cast an ominous overtone to a trial which in no way can be characterized as possessing analogous discovery problems.

In *Giles* the State suppressed evidence which would have been sufficient to show that the "victim" of the rape was blatantly promiscuous and had probably consented to relations with the defendants. The effect of the evidence

in *Giles* and similar cases has been such as might have produced an acquittal or substantial reduction in sentence. Clearly, that is not this case.

II.

THE STATEMENT OF PETITIONER GUAJARDO DID NOT PREJUDICE COLLETTI.

At the trial, counsel for Guajardo, on cross-examination of the police chief, elicited the information that, after his arrest, when asked what he was doing in the victim's home, Guajardo said that he was walking down the street and saw a man run out of the house, whereupon he went to see if there was any trouble.

Colletti alleges that this testimony deprived him of the right to confront the witnesses against him in violation of *Bruton* v. *United States,* 391 U.S. 123, and the Sixth Amendment. Nothing could be further from the truth.

Police Chief Kagann and Officer Zima arrived at the victim's home after receiving the report of a burglary in progress. Chief Kagann entered the house through the basement and proceeded up the inside stairs while Officer Zima went around to the back door. When Chief Kagann reached the living room he observed petitioner Guajardo standing about three feet from a television set, on top of which there was a gun (R. 162-164). Guajardo started toward the set at which time Kagann said "Freeze, police officer" (R. 165).

At the same time he heard a voice, which he recognized as Officer Zima, cry "Hold it, police officer" (R. 165).

Officer Zima testified that as he rounded the northeast corner of the house he saw Colletti running away from the building. He had only covered about 20 or 30

feet of ground when Officer Zima yelled "Hold it, police officer" (R. 313).

Thus, it is perfectly clear that if Guajardo's testimony, that he saw someone run out of the house and then went in to see what was wrong, could have had any effect on the jury, it would have been to vindicate Colletti. Colletti could not have been the man that Guajardo saw unless he had been doing his running on a treadmill. Colletti was arrested while running away from the building. His arrest was heard by Chief Kagann while he was in the living room with Guajardo. If the testimony assigned as error was to be believed, there had to be a second man running from the building. This testimony was to the advantage of Colletti. He obviously could not have been the person referred to. If any cause was prejudiced it was that of the People.

The Appellate Court correctly perceived that Colletti could not have been the person referred to in Guajardo's testimony, and that the fact alone rendered *Bruton* v. *United States,* 391 U.S. 123, inapplicable. For the same reason, *DeLuna* v. *United States,* 308 F. 2d 140 (5th Cir. 1962), relied on by petitioners, does not control here.

CONCLUSION

For the reasons stated above, Respondent herein requests that the Petition for Certiorari be denied.

Respectfully submitted,

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